

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	No. 62069-0-I
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
SIMRANDEEP KANG,)	
)	
Appellant.)	
)	FILED: <u>February 1, 2010</u>
_____)	

Schindler, C.J. — Simrandeep Kang challenges his conviction as an accomplice of robbery in the first degree. Kang contends that the court erred in not granting his motion to sever. Kang also contends that this attorney had a conflict of interest, and insufficient evidence supports his conviction. We affirm.

FACTS

On May 19, 2008, Robert Dowdle was at an apartment with his roommate James Pursley, and several other friends. Two men, Craig Carlis and Simrandeep Kang, came to the apartment to purchase marijuana from Dowdle. Dowdle testified that he knew Carlis, but did not know Kang. Dowdle took the men to his upstairs bedroom and retrieved a bag containing a few grams of

marijuana from his closet. Carlis then pulled out a gun, pointed the gun at Dowdle's face, and demanded Dowdle give him all the drugs and money that he had. Dowdle gave Carlis the bag of marijuana. Carlis gave the bag to Kang and Kang put the bag in his pocket. While Carlis continued pointing the gun at Dowdle, he said "you have got to have more" and "this can't be it." Kang searched the closet and nightstands in the bedroom. Kang then searched Dowdle and took his cell phone and wallet, which contained approximately \$500. Carlis and Kang told Dowdle that if he contacted the police, they would return.

After Carlis and Kang left, Dowdle yelled down to his friends that he had just been robbed with a gun. Dowdle called 911. Later that evening, the police located Carlis and Kang at their apartment. Dowdle and Pursley identified Carlis and Kang as the men who robbed Dowdle.

While in custody, Carlis told the police that Kang took drugs from Dowdle. Carlis also admitted hiding a gun in his apartment, and helped the police find the gun.

The State charged Carlis with one count of robbery in the first degree while armed with a deadly weapon and charged Kang as an accomplice of one count of robbery in the first degree while armed with a deadly weapon. Before trial, Kang filed a motion to sever.

Kang argued that under Bruton v. United States, 391 U.S. 123, 137, 88 S. Ct. 1620 (1968) the admission of Carlis's statements would violate his

constitutional rights. Based on the State's representation that it would not present the statements in its case-in-chief, the trial court deferred ruling on the motion to sever. "So I think the Court can reserve this ruling until we see what comes forward in the case-in-chief and see what comes forth in the testimony."

Dowdle, Pursley, two other witnesses, who were present at the apartment, and three police officers testified at trial on behalf of the State. Kang's defense was that he was not at Dowdle's apartment and was mistakenly identified. Two alibi witnesses testified on Kang's behalf. Kang did not testify.

The jury convicted Kang as an accomplice of robbery in the first degree.

ANALYSIS

Motion to Sever

Kang contends the court erred in not granting the motion to sever his case. But contrary to Kang's assertions, the trial court did not deny the motion to sever. After the State agreed to not introduce Carlis's statements that could implicate Kang, the court deferred ruling on the motion.

At trial, the State did not present any statements that Carlis made implicating Kang and Kang did not renew his motion to sever. On this record, Kang cannot raise this issue for the first time on appeal. RAP 2.5(a).

Conflict of Interest

For the first time on appeal Kang also contends his attorney had a conflict of interest that requires reversal. Kang argues his attorney provided ineffective

assistance based on the conflict of interest.

The Sixth Amendment to the United States Constitution guarantees the right to the assistance of an attorney free from conflict of interest. Wood v. Georgia, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981); State v. Davis, 141 Wn.2d 798, 860, 10 P.3d 977 (2000). To warrant reversal of a conviction on this ground, the defendant bears the burden of proving that an actual conflict of interest adversely affected the attorney's performance. State v. Dhaliwal, 150 Wn.2d 559, 573, 79 P.3d 432 (2003) (citing Mickens v. Taylor, 535 U.S. 162, 174, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002)). A possibility of a conflict of interest is not enough to warrant reversal. Dhaliwal, 150 Wn.2d at 573.

During cross examination, Pursley said Kang's attorney had previously represented him.

Q What was on TV?

A The X-Box thing. I told you.

Q You played a game or TV?

A Game, movie. Man, it's all – I don't want to be in here with you badgering me. I came in here to answer the question. You're not going to do this to me. It's really going to irritate me, you know. I used to be your client. Don't do this to me. . . . I'm smarter than this man. You ain't going to play me like that.

Kang relies on In re Personal Restraint of Richardson, 100 Wn.2d 669, 677, 675 P.2d 209 (1983), to argue that the court erred in not inquiring about a potential conflict of interest. But in Dhaliwal, our supreme court held that automatic reversal is not required when the trial court does not inquire about a

possible conflict of interest unless the conflict adversely affects the attorney's performance. "[T]o show a violation of the Sixth Amendment right to counsel free from conflict, the defendant must always demonstrate that his or her attorney had a conflict of interest that adversely affected his or her performance. Dhaliwal, 150 Wn.2d at 570. Here, Kang cannot show his attorney's performance was adversely affected by a potential conflict. The record demonstrates that Kang's attorney effectively cross examined Pursley and impeached his credibility.

Sufficiency of the Evidence

Kang argues there was insufficient evidence to convict him as an accomplice of robbery in the first degree while armed with a deadly weapon. Kang contends that the identification of him by the witnesses were faulty, there was no physical evidence corroborating Dowdle's testimony that he searched the closet and nightstands, and no evidence that he assisted in the robbery.

"The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Salinas, 119 Wn.2d at 201.

To convict Kang as an accomplice to robbery in the first degree, the State had to prove that Kang solicited, committed, encouraged or requested Carlis to commit the robbery, or he aided or agreed to aid Carlis in planning or committing the robbery, knowing that the acts would promote or facilitate the crime. State v. Berube, 150 Wn.2d 498, 511, 79 P.3d 1144 (citing RCW 9A.08.020(3)(a)).

Substantial evidence supports the conviction. Kang and Carlis went to the apartment to purchase drugs from Dowdle. Carlis pointed the gun at Dowdle and demanded the drugs and money. After Dowdle gave Carlis the drugs, Carlis handed the drugs to Kang. While Carlis continued point the gun at Dowdle's face, Kang then searched the room for more drugs. Kang then searched Dowdle's, taking his cell phone and his wallet containing \$500. Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could find beyond a reasonable doubt that Kang was guilty as an accomplice of robbery in the first degree while armed with a deadly weapon.'

We affirm.

Schindler, CT

WE CONCUR:

Cox, J.

Grosse, J

No. 62069-0-I/7